MOTION FILED

OCT 4 1984

No. 84-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

and

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHASE MANHATTAN CORPORATION IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, The Chase Manhattan Corporation respectfully moves for leave to file a brief *amicus curiae* in the above-captioned proceedings, and in support thereof states:

1. While the United States and petitioners have consented to *amicus'* filing, *amicus* has been unable to obtain the consent of all intervenor-respondents to the filing of the attached brief *amicus curiae.*

2. The decision of the United States Court of Appeals for the Second Circuit upholding the restrictive New England regional banking compact against constitutional challenges raises questions of far-reaching importance to the nation's banking system and the proper functioning of the federal system.

3. As explained more fully in the attached brief, the decision below will substantially and adversely affect the ability of *amicus curiae* to compete on equal terms in New England's full-service banking market. For that reason, *amicus* has a vital continuing interest in the outcome of this litigation that can only be protected by prompt review by this Court.

4. Accordingly, *amicus* seeks this opportunity to make known its views to the Court and assist the Court in its decision on the Petition for Writ of Certiorari.

Counsel for *amicus* hereby requests that the Court grant this Motion for Leave to File Brief Amicus Curiae and that the attached brief be accepted as part of the record in this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE CHASE MANHATTAN CORPORATION IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE

The Chase Manhattan Corporation is a bank holding company with its principal place of business in New York. Operating through The Chase Manhattan Bank, N.A., and other subsidiaries, it provides financial services to individuals, corporations and governmental entities throughout the United States and in more than 100 other countries.

This litigation raises questions of critical importance to Chase Manhattan and the nation's banking industry.

Long-standing federal policy has divided the nation into separate state banking units. That policy is eroding rapidly as banks encounter intense new competition from non-bank institutions that offer a wide range of financial services across state lines. To continue serving its customers effectively in this changing environment, Chase Manhattan, like many other banks, has been drawn into new geographic and product markets. Chase Manhattan's non-bank subsidiaries maintain offices in nearly twenty states, including Massachusetts and Connecticut.[1] Some services these non-bank subsidiaries offer compete directly with intervenor-respondents and other financial institutions based in New England. But the regional banking compact upheld by the court below deprives Chase Manhattan and other banks from disfavored states of an opportunity to compete on equal terms in New England's full-service banking market.

The New England regional banking compact is an avowedly protectionist scheme whose purpose and effect is to confer a competitive advantage on financial institutions in one section of the country[2] at the expense of

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[1] Chase Commercial Corporation, which provides asset-based lending and equipment lease financing, has offices in Boston and Canton, Massachusetts. Chase Home Mortgage Corporation engages in mortgage banking at offices in Boston and Waltham, Massachusetts. Chase National Corporate Services, Inc. has regional marketing offices in Stamford, Connecticut, and Boston, Massachusetts that promote Chase's commercial lending and other services. Chase Manhattan Financial Services, Inc. provides consumer and small business financial services at an office in Greenwich, Connecticut.

[2] The scheme does not uniformly benefit all financial institutions in the compact area. By limiting the class of eligible bidders for banks within the compact states, it depresses the price at which banks are sold—to the advantage of the acquiring bank and the disadvantage of the acquired bank. Not surprisingly, smaller banks that see themselves as possible merger partners with larger institutions have generally opposed the establishment of regional banking compacts.

financial institutions in other regions. Under the terms of the Massachusetts and Connecticut legislation, bank holding companies headquartered in any New England state are permitted to acquire a bank in Massachusetts or Connecticut. By contrast, bank holding companies headquartered outside the region[3] are disqualified, solely by reason of their state of origin, from acquiring banks within the state or otherwise offering full-service banking in head-to-head competition with the region's banks. The disqualification is effective even against a state, like New York, that offers to admit out-of-state banks on condition of reciprocity. Like all protectionist schemes, the compact also penalizes consumers in the relevant market by reducing competition—in this case, the competition for loans and deposits.

The New England compact is not an isolated response to unique historical or geographic circumstances. On the contrary, it signals the division of most of the nation into regional banking common markets, with boundaries gerrymandered to exclude certain boycotted states. In one of the orders under review, the Federal Reserve Board noted that legislative activity to establish exclusionary regional markets was underway or already completed in 15 states. The Board acknowledged the "potential danger" that upholding the New England compact would "divide the country into a number of banking regions." 70 Fed. Res. Bull. 374, 379 (1984) (A47). Movement in this direction has accelerated in the months

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[3] Sponsors of the compact have made no secret of its principal target: the major New York money center banks, including Chase Manhattan. The Massachusetts Act's sponsor, Senator John Brennan, says that the Act is to prevent entry of "big money center banks." N.Y. Times, April 3, 1983 (excerpts from Senator Brennan's statement appear at page 189 of the Appendix to the Petition for Writ of Certiorari, referred to hereafter as "A——)"). *See also* Conn. Senate Debate (May 18, 1983) (statement of Senator Sullivan) (A159); *Panelists Predict Bigger Regions Following Regional Banking Compacts*, 42 Washington Financial Rep. (BNA) 1081 (June 25, 1984) ("money-center banks in New York, California, and Illinois" are excluded from regional compacts).

following the Board's decision, and the emulation of New England's exclusionary policy by other regional blocs can only compound the injury to Chase Manhattan and other bank holding companies from disfavored states.

Given the importance of the questions presented and the dangers inherent in the Balkanization of the nation's banking system, Chase Manhattan submits this brief in support of the petition for writ of certiorari.

SUMMARY OF ARGUMENT

The regional banking compact upheld by the court below threatens a fundamental and irreversible change in the structure of the nation's banking system. This change will operate to the detriment not only of *amicus*, petitioners and many other financial institutions, but also of consumers of financial services. In addition, this unprecedented compact offends elemental constitutional principles expressed in the Commerce and Compact Clauses. Its explicit purpose is to make a benefit available to banks in favored states that is withheld from banks in disfavored states. The inevitable effect of such a compact is to invite reprisal and nurture a sectionalism so dangerous that the framers of the Constitution established constitutional protections to guard against it.

The regional banking compact at issue in this case is a paradigm of the overtly protectionist legislation this Court has repeatedly struck down under the Commerce Clause. Contrary to the assertion of the Federal Reserve Board and the court below, no federal legislation authorizes this unprecedented affront to constitutional principles governing the movement of goods and services in interstate commerce. The Douglas Amendment, on which the Board and lower court rely, falls far short of the express authorization this Court has previously considered essential to uphold otherwise impermissible state interference with interstate commerce.

Further, this Court has held that the Compact Clause requires congressional consent to multistate agreements

that encroach upon federal supremacy. The New England banking compact, to which Congress has not consented, encroaches upon federal supremacy in at least two respects. First, in an area of pervasive federal regulation its members seek to achieve a result through concerted action that no one of them could have accomplished on its own. Second, the compact aggrandizes the power of member states to the detriment of their sister states and harmonious relations within the federal system.

ARGUMENT

This action arises out of the Federal Reserve Board's approval of a merger and two acquisitions involving intervenor-respondents: six Massachusetts and Connecticut bank holding companies. In each instance, the parties to the transaction are located in different states. Petitioners—a Connecticut bank holding company, its wholly owned bank subsidiary, and a New York bank holding company—opposed the consolidations.

The Bank Holding Company Act, 12 U.S.C. §§ 1841 *et seq.*, prohibits the Board from approving interstate consolidations unless (1) the transaction is found to meet federal standards in the areas of competitive impact and financial condition and (2) the acquisition "is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. § 1842(d). The provision establishing this second requirement is known as the Douglas Amendment.

In the proceedings before the Federal Reserve Board, petitioners contended that the Massachusetts and Connecticut Acts could not furnish the necessary state law authorization for the acquisitions because they are unconstitutional under the Commerce, Compact, and Equal Protection Clauses of the Constitution. The Board conceded that it has little constitutional expertise (A39-41) and that "the issue is not free from doubt" (A41), but it nevertheless upheld the state legislation. It contended that the Douglas Amendment amounts to a "renunciation

of federal interest in regulating the interstate acquisition of banks by bank holding companies." (A52). On that premise, it concluded that Congress has authorized the states to take action that would otherwise violate the Commerce Clause and that the New England regional compact does not require the consent of Congress under the Compact Clause. The court below upheld the Board's orders, and petitioners seek this Court's review of that decision on the grounds that the compact violates the Commerce and Compact Clauses.

I. The Petition Should Be Granted Because It Raises Questions of Far-Reaching Importance to the Nation's Banking System.

The practical impact of the decision below is beyond dispute. It will unleash a wave of bank mergers and acquisitions both inside and, for defensive reasons, outside the protected regions. As banks scramble to preserve or enhance their competitive positions in a radically altered regulatory environment, the structure of the nation's banking industry will profoundly change. Given the virtual impossibility of undoing completed mergers, that change must be considered irreversible.

Immediately at issue are three transactions involving some of the largest banks in New England, including Bank of Boston Corporation, the biggest bank holding company in New England, with $19.5 billion in assets; CBT Corporation, the biggest bank holding company in Connecticut, with $5.9 billion in assets; and a number of other large financial institutions. Other consolidations are imminent.[4] As New England-style compacts are es-

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[4] Intervenor-respondent Bank of Boston received Federal Reserve Board approval on August 20, 1984 for a merger with Rhode Island's second largest commercial banking organization, RIHT Financial Corp. *Fed Lets Bank of Boston Acquire Right in 4th New England "Compact" Merger*, 43 Washington Financial Rep. (BNA) 346 (August 27, 1984). The Southeast restrictive regional banking network has generated a number of proposed mergers. *See, e.g., Here Comes Regional Banking*, Forbes, August 27, 1984, at 10; Edwards, *Wres-*

tablished throughout the country,[5] the repercussions will be felt in every one of the 50 states and the District of Columbia.

Although it approved the acquisitions, the Federal Reserve Board declined to comment on "the desirability, as a matter of national policy, of the regional arrangements provided for" by the state legislation at issue. 70 Fed. Res. Bull. 374, 379 (1984) (A34). In an effort to explain this apparent abdication of its regulatory responsibility, the Board stated that "the public policy issues that are raised by the regional approach are inherently national and would be best resolved by Congressional action." *Id.*

In fact, proponents of regional banking *have* taken the issue to Congress,[6] but they have failed to obtain congressional authorization. Neither the House nor the

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tling with Mergermania, U.S. Banker, June 1984, at 36. *See also Financial Deregulation: Hearings on H.R. 5734 Before the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. 435, 454 (1984) (statement of William B. Weaver, Vice-President of the First Boston Corp.). Regional, restrictive banking has also encouraged defensive mergers, both intrastate and among banks in non-compact states. *See generally* Edwards, *Wrestling with Mergermania*, and Wade, *The New England Regional Compact*, U.S. Banker, June 1984, at 45.

[5] Since the Board's March 26 decision, Florida, North Carolina, South Carolina, and Utah have enacted regionally restrictive banking legislation, Fla. C.S.H.B. 795 (1984); N.C. S.B. 706 (1984); S.C. S.B. 959, H.B. 3743 (1984); Utah S.B. 9 (1984), with the first three now joining Georgia, Ga. H.B. 1198 (1984), and Kentucky, KY. H.B. 67 (1984), in a Southeast banking compact. Legislative proposals for restrictive regional banking are now pending in many other states. *See, e.g.*, Bennett, *1985: Year for Regional Interstate Banking in the Midwest?*, American Banker, August 17, 1984, at 1 (Midwest is "following the lead of New England and the Southeast").

[6] *See* H.R. 2431, 98th Cong., 1st Sess. (1983) (proposed by Representative Frank of Massachusetts); S. 1002, 98th Cong., 1st Sess. (1983) (proposed by Senator Tsongas of Massachusetts). *See also* H.R. 5446, 98th Cong., 2d Sess. (1984).

Senate has even held hearings on the subject. A provision authorizing regional banking was included in an omnibus banking bill, the Financial Services Equity Act, S. 2851, 98th Cong., 2d Sess. (1984), that passed the Senate on September 13, 1984, but the Chairman of the House Banking Committee has given notice that the issue will not be taken up by his Committee or the House during the current session. Commenting on problem areas in the Senate bill, he noted that regional banking compacts "raise significant constitutional questions." [7]

House Judiciary Committee Chairman Peter Rodino voiced similar concerns in explaining the need for his Committee to hold hearings on any legislation to authorize regional banking compacts:

> By its very nature, an interstate compact of this type also raises other Constitutional questions requiring careful consideration. It is possible, even likely, that regional banking compacts designed to promote the interests of certain banks within particular regions at the expense of other financial institutions in the rest of the country may significantly undermine the rationale of the Commerce Clause . . . .[8]

Surprisingly, the Board and the court below discerned no need for any further congressional action on this subject because they concluded that Congress had implicitly blessed regional banking compacts nearly 30 years ago when it passed the Douglas Amendment. 12 U.S.C. § 1842(d). But on its face, that Amendment says nothing whatsoever about regional banking. Nor does its

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[7] 130 Cong. Rec. H10005 (daily ed., Sept. 24, 1984) (statement of Rep. St Germain) *reproduced in* the Appendix to this brief at App.-4.

[8] Letter from Peter W. Rodino, Chairman, House Committee on the Judiciary, to Thomas P. O'Neill, Jr., Speaker of the House (Sept. 14, 1984) *reproduced in* the Appendix to this brief at App.-1.

legislative history give any indication that Congress considered the possibility of discriminatory multistate arrangements, much less intended to approve them.[9]

In view of the implications of the New England banking compact for the nation's banking system and the uncertain (to say the least) authority for the proposition that nearly 30 years ago Congress somehow acquiesced in this monumental change in 1984, *amicus* submits that the questions raised by the petition for writ of certiorari urgently warrant this Court's review.

II. The Petition Should Be Granted Because It Raises Questions of Fundamental Importance to Federal-State Relations and the Proper Functioning of the Federal System.

Precipitating this fundamental recasting of the banking landscape is a multistate arrangement quite literally without precedent in our nation's history. *Amicus* is aware of no prior instance of a group of states' banding together to form an exclusionary market or free trade zone whose explicit purpose was to discriminate against goods or services originating in other states or regions. The Federal Reserve Board itself pointed out that there are

> no judicial decisions testing the constitutionality of state regulatory arrangements which discriminate in favor of residents of selected regional groupings of states and exclude residents of all other states from the benefits provided to the regional groups.

70 Fed. Res. Bull. 374, 379 (1984) (A50).[10]

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[9] The legislative history indicates consideration of regional banking only to this extent: In its report on the legislation, the House Banking and Currency Committee noted that legislative proposals had been made to permit national banks to branch on the basis of "trade areas" or Federal Reserve Districts. The Committee rejected such proposals as being without merit. H.R. Rep. No. 609, 84th Cong., 1st Sess. 203 (1955) (A132).

[10] As the Board noted, interstate agreements at issue in prior cases "have not had the objective of discrimination but rather that

The concept of an exclusionary regional common market flies directly in the face of fundamental precepts embedded in the Commerce and Compact Clauses of the Constitution. Action by one state to "protect its own inhabitants from competition," *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538 (1949), is troublesome enough. When a group of states combine forces to accomplish a similar result on behalf of the citizens of their entire region, the problem is greatly compounded. Indeed, a keen appreciation of the dangers of sectionalism was a powerful force behind adoption of the Constitution.[11] Time and again the constitutional debates reveal awareness of the dangers of partial "confeder-

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of cooperation on a subject matter of exclusive interest to the states that are parties to these agreements." 70 Fed. Res. Bull. 374, 379 n.5 (1984) (A50 n.5).

House Judiciary Committee Chairman Rodino also noted the unprecedented nature of the proposed compacts:

> In the past, Congress has consented to two types of compacts: the first being those which are designed to promote cooperation among States and which are open to all affected States to join; and the second being those that do not interfere with the Federal regulation of matters of national concern. In contrast, Title X [of S. 2851, which would approve regional banking agreements] would appear to authorize a commercial compact open only to a "select" group of States in subject matter areas specifically regulated by the Federal Government.

Letter to House Speaker O'Neill, *reproduced in* the Appendix to this brief at App.-1.

[11] In enumerating the reasons for adoption of the Constitution, Madison reported that "[i]t seems to be feared that the Northern States will oppress the trade of the South. . . . The middle States may apprehend . . . combinations against them between the Eastern and Southern states." Madison, *Debates in the Federal Convention of 1787, reprinted in Documents Illustrative of the Formation of the Union of the American States*, H. Doc. No. 398, 69th Cong., 1st Sess. 384-87 (1927). "[D]ifferent interests" would lead regions of the nation to "oppressive regulations" of commerce. *Id.* at 633-38.

acies" or "combinations."[12] Hamilton warned that "[e]ach . . . separate confederacy . . . would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions which would beget discontent." *The Federalist Papers* No. 7 at 62-63 (Rossiter ed. 1961).

It was in large measure to guard against just such sources of sectional rivalry and discontent that the framers crafted the Commerce and Compact Clauses of the Constitution. Each of these Clauses requires invalidation of the New England banking compact.

A. The Massachusetts and Connecticut Acts Violate the Commerce Clause.

The Massachusetts and Connecticut Acts discriminate against out-of-state bank holding companies that seek to acquire local banks solely by reference to their state of origin. These Acts are paradigms of the overtly protectionist legislation repeatedly struck down by this court as *per se* violations of the Commerce Clause. *See, e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).[13] Even assuming *arguendo* that the Massachusetts and Connecticut statutes were enacted to promote some colorably legitimate state interest—and the record below makes clear that they were not—the statutes would nevertheless violate the Commerce Clause. They impose a substantial burden on interstate commerce that is unnecessary to meet any proffered state interest. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 36-37.

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[12] *Id.* at 239-40, 245, 292, 298-99, 302, 304, 315, 372, 374, 382.

[13] The Commerce Clause gives Congress plenary power "to regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. The negative implications of the Commerce Clause also limit the power of the states to interfere with interstate commerce. *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976).

This Court has identified an economic[14] and a political[15] element underlying the Commerce Clause. The Massachusetts and Connecticut statutes offend both. Economically, they create a new regional banking market from which out-of-region banks are excluded. Politically, they impose the burdens of the legislation squarely on persons excluded from the compact states' political processes.

Congress can, of course, authorize states to enact legislation that would otherwise violate the Commerce Clause,[16] though this Court has never had to consider whether Congress could authorize the kind of overt discrimination among states that characterizes the New England compact. In any event, the authorization must be "unmistakably clear." *See, e.g., South-Central Timber Development, Inc. v. Wunnicke*, 104 S. Ct. 2237 (1984). That requirement serves not only to eliminate doubt about the will of Congress; it also assures that adversely

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[14] *See H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-38 (1949):

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has its corollary that the states are not separable economic units. As the Court said in *Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511, 527 [1935] . . . "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."

[15] Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subject to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938). *See also Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-68 n.2 (1945).

[16] The Board noted that "[a]bsent congressional authorization of [the Connecticut statute] in the Douglas Amendment, it appears the [statute] would be inconsistent with the standards for state action under the Commerce Clause as established by the Supreme Court." 70 Fed. Res. Bull. 374, 381 (1984) (A55).

affected interests will have fair notice and an opportunity to participate in the resolution of the issue. As this Court stated last Term:

> [W]hen Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

Id. at 2243.

The Douglas Amendment falls far short of the "express" authorizations this Court has previously found necessary to save state statutes that would, but for the authorization, constitute impermissible interference with interstate commerce.[17]

The opinion of the court below nowhere explains how the language or legislative history of the Douglas Amendment could reasonably be said to furnish "unmistakable evidence" that Congress intended to grant the states plenary power over banking acquisitions or the authority to condition their approval of interstate mergers on grounds that are blatantly discriminatory or otherwise offensive to well-accepted constitutional principles. Indeed, there is no indication that Congress even considered the power of a single state—much less a group of states—to discriminate among out-of-state banks solely

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[17] In the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, for example, Congress unmistakably conferred on the states plenary power to regulate insurance. Section 1, 15 U.S.C. § 1011, provides:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

on the basis of their state of origin.[18] Under these circumstances, the state statutes at issue here must be considered unconstitutional under the Commerce Clause.

B. The Massachusetts and Connecticut Acts Violate the Compact Clause.

The Compact Clause of the Constitution provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." Art. I, § 10, cl. 3. Application of that Clause depends upon a finding that (1) two or more states have entered into a compact; (2) the compact is of a type that requires congressional consent; and (3) Congress has not consented. *Cuyler v. Adams*, 449 U.S. 433, 439-40 (1981); *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452, 467-71 (1978).

The first and third points present no difficulty in this case. A compact need not be explicit or in writing, *Virginia v. Tennessee*, 148 U.S. 503, 517-18 (1893), and it may be found in reciprocal legislation alone. *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452, 469-70 (1978). Given the legislative history of the New England compact, which shows an unmistakable intention on the part of Massachusetts and Connecticut to act in concert, the Board had no difficulty concluding that their reciprocal statutes constitute an interstate compact. 70 Fed. Res. Bull. 374, 380 (1984) (A51-A52).

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[18] The Federal Reserve Board was more candid about the difficulty of finding "unmistakable evidence" that the Douglas Amendment saves the New England compact. It noted that the Amendment "does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states having reciprocal laws, but against all other states," 70 Fed. Res. Bull. 374, 384 (1984) (A65) (emphasis supplied), and that it does not appear to meet "the stringent test of explicitness laid down by the Supreme Court." *Id.*

Nor can there be any doubt concerning the absence of congressional "consent" to the compact at bar.[19] Whatever the Douglas Amendment means, it surely does not constitute consent within the meaning of the Compact Clause. It makes no reference to compacts of any kind, and the debate surrounding its enactment contains no scrap of evidence to suggest that Congress intended by its passage to pre-authorize[20] a breed of compact that no one had yet thought to propose.

The issue before this Court, therefore, is whether the New England compact is the type of "Agreement or Compact" that is necessarily invalid (whatever its other infirmities) in the absence of congressional consent. This Court has noted that the Compact Clause requires congressional consent for agreements between states that "tend to increase and build up the political influence of the compacting states, so as to encroach upon or impair the supremacy of the United States." *See United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452, 467 (1978) (quoting from *Virginia v. Tennessee*, 148 U.S. 503, 517-18 (1893)).

The court below offered neither reason nor citation in support of its one-sentence conclusion that the New England banking compact would not "encroach upon or impair the supremacy of the United States." In fact, the compact will have precisely that effect in at least two distinct ways. First, it intrudes upon the pervasive fed-

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[19] The Board noted that "in form" the New England compact was a "compact or agreement that has never been approved by Congress." It then proceeded to argue that no consent was necessary. 70 Fed. Res. Bull. 374, 380 (1984) (A52).

[20] Congress disfavors the pre-authorization of compacts. Judiciary Committee Chairman Rodino, in a letter to House Speaker O'Neill, *supra* at p. 8, states that "[t]ypically, compacts are negotiated and agreed to by the States and then submitted to the Congress for careful review and approval. . . . While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences." App.-1.

eral regulation of interstate banking. Second, it aggrandizes the power of compact states to the detriment of their sister states.

1. ***Interference With Federal Regulatory Authority.***

The Federal Reserve Board and the court below maintained that the New England compact could not encroach upon federal regulatory authority in the area of interstate banking because Congress renounced that authority in the Douglas Amendment. (A29, A52). That position rests on a fundamental misapprehension of the language, history and purpose of the Douglas Amendment and ignores the federal government's pervasive regulation of interstate banking.[21]

On its face, the Douglas Amendment does not disclaim federal authority and responsibility. On the contrary, as this very litigation illustrates, the Bank Holding Company Act, of which the Douglas Amendment is a part, establishes as one of the conditions for an interstate bank acquisition review and approval by a federal agency, the Federal Reserve Board, which tests the acquisition under federal standards. *See* 12 U.S.C. §§ 1842 (a) and (d).[22] Out of deference to state concerns, the Douglas Amendment provides that an acquisition is *not* permitted unless, among other conditions, it is specifically authorized by the law of the state in which the acquired bank is located. That hardly suggests federal indifference to the conditions under which such acquisitions *do* take place.[23]

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[21] *See, e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980).

[22] The Board's criteria for approving acquisitions indicate the pervasive nature of the federal government's regulatory control. The Board must assess potential anticompetitive effects of acquisitions, and it may approve an anticompetitive acquisition only if in the "public interest." 12 U.S.C. § 1842(c). The Board must further evaluate the involved banks' financial and managerial resources and the needs of the relevant communities. *Id.*

[23] Recent amendments to the Douglas Amendment illustrate the continuing federal role in defining the conditions under which in-

In setting federal policy in this area, Congress has declined to give express approval to regional banking. Yet Connecticut and Massachusetts now seek to accomplish what Congress has declined to do. Through their joint action these states would bring about a result that neither could have achieved on its own.[24] The Compact Clause was designed to safeguard federal interests in precisely such a case by requiring that the state parties to the agreement first obtain congressional consent.

It is surely no answer to say, as did the court below, that Congress can adequately protect its interests by subsequently enacting legislation to restore the status quo. (A32). That reasoning stands the Compact Clause on its head. The plain intention of the framers was to put the burden of obtaining congressional approval on the states that seek to establish a compact, not to make the opponents of a compact—including Congress itself—initiate action to disapprove it.

2. *Aggrandizement of State Power at the Expense of Other States.*

The New England compact encroaches on the supremacy of the United States in a second sense: It seeks to aggrandize the power of compact states at the expense of

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terstate mergers can and cannot take place. The amendments allow federal authorities to arrange interstate acquisitions to facilitate the salvage of failing or failed banks even where such acquisitions are not permitted under state law. *See* 12 U.S.C. § 1823(f), enacted as part of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982).

[24] In contrast to the situation in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), the result that Massachusetts and Connecticut seek depends upon their joint action. These two states have not only enacted parallel rules to govern their relationship with the country as a whole, they have also agreed to treat each other differently from the way they treat the rest of the country. That differential, necessarily brought about by agreement and not simply parallel action, is the very reason-for-being of their arrangement.

their sister states. It is in large part because compacts "may affect the interest of States other than those parties to the agreement . . . [that] Congress must exercise national supervision through its power to grant or withhold consent . . ." Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95 (1926). *See also Florida v. Georgia*, 58 U.S. (17 How.) 478, 494 (1855) (Compact Clause serves to protect "the rights and interests of other States, and to prevent any compact or agreement betwen any two States, which might affect injuriously the interest of the others"); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838) (Compact Clause is designed to "guard against the derangement of [a state's] federal relations with the other States of the Union, *and* the federal government") (emphasis supplied); *United States v. Tobin*, 195 F. Supp. 588, 606 (D.D.C. 1961) (under the Compact Clause "Congress has a two-fold duty: . . . to prevent undue injury to the interests of non-compacting states" and to protect the interests of the federal government) (citations omitted). The compact at issue in this case not only has the effect of injuring interests in other states, it is *intended* to "redound to the benefit of [a] particular group of States [and] to the harm of others." [25] For this reason, too, the

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[25] *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 477 (1978). The Court implicitly recognized in that case that a compact enlarging the power of some states at the expense of others can, for purposes of Compact Clause analysis, be said to encroach upon the supremacy of the United States. Those who challenged the compact, which any state was free to join, alleged that the agreement would impair the sovereign rights of nonmember states. 434 U.S. at 477. The Court rejected the argument on the basis of a finding that the compact did not, in fact, "redound to the benefit of any particular group of States or to the harm of others." *Id. Cf. New York v. O'Neill*, 359 U.S. 1, 6 (1959) (upholding, despite the absence of congressional consent, a compact that was not "divisive" but rather "increas[ed] harmony within the federalism created by the Constitution"). Significantly, the Court did not dismiss the contention as irrelevant to Compact Clause analysis.

absence of congressional consent is sufficient to require its invalidation.

Indeed, agreements between states that encroach upon the power of their sister states have on occasion been said to fall under the Treaty, Alliance or Confederation Clause of the Constitution, Art. I, § 10, cl. 1, rather than the Compact Clause. *See, e.g., Ford v. Surget*, 97 U.S. 594, 603 (1878); 1 W. Blackstone, *Commentaries*, Appendix 310 (S. Tucker ed. 1803); *cf. United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 466-67 n.18 (1978) (quoting *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 248 (1833) (Marshall, C.J.)). The Treaty, Alliance or Confederation Clause unequivocally *prohibits* such combinations, whether or not they receive congressional consent.[26]

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[26] Moreover, the Massachusetts and Connecticut Acts arguably violate the Equal Protection Clause, U.S. Const. amend. XIV, § 1. The court below, in upholding the Acts against an equal protection challenge, maintained that the legislation was rationally related to a hypothetical commercial purpose. It is far from clear, however, that a statute drafted solely for the purpose of regional protectionism and discrimination is rationally related to a legitimate state purpose. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 439 (1982) (Blackmun, J., plurality) ("rational-basis standard is not a toothless one") (quoting *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981)). Furthermore, the court below did not even consider whether the nature of the classification—discrimination on the basis of residence in a particular state or region—may require heightened equal protection scrutiny. *See Plyler v. Doe*, 457 U.S. 202 (1982) (applying intermediate level of review).

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX 1

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, D.C. 20515
Telephone: 202-225-3951

September 14, 1984

Honorable Thomas P. O'Neill, Jr.
The Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

The "Financial Services Competitive Equity Act" (S. 2851), which was debated on the Senate floor during the past week, will reach the House shortly. On behalf of the Committee on the Judiciary, I am writing to you to request that this bill be referred to this Committee for consideration and possible action as a result of certain provisions which substantially affect matters coming within Rule X jurisdiction of the Committee.

In particular, Title X of S. 2851 contains language that would grant prior Congressional consent to certain groupings of States to enter into interstate compacts involving regional banking activities. It is important that this Committee—which has jurisdiction over interstate compacts generally—be permitted to review the language and intent of this provision because Title X on its face appears to be a major departure from past practice in the manner in which Congress approves an interstate compact consistent with the Compact Clause of the Constitution. In the past, Congress has consented to two types of compacts: the first being those which are designed to promote cooperation among States and which are open to all affected States seeking to join; and the second being those that do not interfere with the Federal regulation

of matters of national concern. In contrast, Title X would appear to authorize a commercial compact open only to a "select" group of States in subject matter areas specifically regulated by the Federal Government.

In addition, Title X departs from past Congressional practice and procedure in that it would grant prior approval to such compacts rather than to require subsequent approval on a case-by-case basis. Typically, compacts are negotiated and agreed to by the States and then submitted to the Congress for careful review and approval. Title X would, in essence, preauthorize compacts without advanced review of the content or standards contained in those agreements. While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and and thoughtful deliberation of the potential consequences. The Judiciary Committee—the Committee of jurisdiction in this instance—has had no such opportunity to develop a record or engage in any deliberations on the potential Constitutional and economic implications of Title X.

By its very nature, an interstate compact of this type also raises other Constitutional questions requiring careful consideration. It is possible, even likely, that regional banking compacts designed to promote the interests of certain banks within particular regions at the expense of other financial institutions in the rest of the country may significantly undermine the rationale of the Commerce Clause, which was designed to eradicate internal trade barriers and prevent States from aligning themselves into rival economic coalitions. If this were, in fact, the unfortunate outcome of Title X, such might invite retaliation by States in excluded regions of the country.

Title X also has important implications for the Federal antitrust laws, also a subject matter within the jurisdiction of the Judiciary Committee. The cornerstone of American antitrust law is the principle that unrestrained competition will yield the best allocation of our economic

resources, thus benefitting the interest of consumers. Because such compacts as provided by Title X may work to restrict competition for deposits and loans, the price for that type of restriction might well be paid by consumers. The implications of this legislation for the national competition policy will therefore also need careful scrutiny by this Committee.

For the above reasons, I request that you refer S. 2851 to the Judiciary Committee for its review. Furthermore, it is requested that Members of this Committee be included in any conference on S. 2851.

With best wishes,

Sincerely,

/s/ Peter W. Rodino, Jr.
PETER W. RODINO, JR.
Chairman

PWR:jyl

APPENDIX 2

STATEMENT OF CHAIRMAN FERNAND J. ST. GERMAIN ON FLOOR OF THE HOUSE OF REPRESENTATIVES

SEPTEMBER 24, 1984

LOOPHOLE CLOSING LOST IN THE BRANCHES OF THE CHRISTMAS TREE

* * * *

The Senate, * * * on September 13 adopted what can only be accurately described as a Christmas tree festooned with brightly colored ornaments of all shapes and sizes—credit union amendments, export trading company provisions, a basket of new powers for bank holding companies including new securities activities, consumer leasing amendments, new rules for brokered deposits, preemption of state usury laws, green-mail, golden parachutes provisions amending securities statutes, regional banking compacts which raise significant constitutional questions, new powers for savings and loan associations . . . the list goes on and on. The implications of these provisions won't be known for months, and in some cases, years. The legislation is so far ranging and so broadly drafted that at least three House Committees have jurisdiction—Banking, Energy and Commerce and Judiciary.

None of us on the House Banking Committee would feel comfortable in standing up on this floor in the remaining few days of this Congress urging our colleagues to accept any part of this conglomeration on which neither we nor the Energy and Commerce nor Judiciary Committees have had hearings or markup and on which we all know there is a wide divergence of opinion. It would be a shot in the dark which we and the nation might regret for years to come.

* * * *

* * * Every member of the House, I am sure, quickly perceives the difficulties of asking for consideration of a massive rewriting of key statutes covering banking, securities, and interstate commerce when there have been few hearings, votes or debate. In fact, in most cases, absolutely none.

Completely aside from the political realities in the House, we must look at the fact that we are talking about a monumental change in banking and its relationship to the rest of the economy. A fundamental shift that may well determine how credit is delivered, financial services dispensed, and the entire economy structured for decades to come. This is not the stuff of quickie midnight conferences in the closing hours of the session.

Not only is there a major concern about what these new powers may mean to the economic future of the nation, but also to the safety and soundness of the banking industry, itself.

* * * *

The Banking Committee will be considering these issues in the next session. I regret that it is not possible to move the loophole closing legislation this session, but it is obvious that the Senate will not consider it unless we buy off on new powers. Again, something that I know would be a futile effort in the House at this moment.

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